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No. 06-1603

In the Supreme Court of the United States

ROSALINE KENNEDY, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Board of Immigration Appeals (BIA or Board) did not abuse its discretion in denying petitioner's motion to reconsider the denial of petitioner's second untimely motion to reopen her removal proceedings based on allegations of ineffective assistance of counsel.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 10
Conclusion 23

TABLE OF AUTHORITIES

Cases:

A-A-, In re, 22 I. & N. Dec. 140 (B.I.A. 1998) 11, 12
Abdi v. *United States Att'y Gen.*, 430 F.3d 1148 (11th Cir. 2005) 9
Akwada v. *Ashcroft*, 113 Fed. Appx. 532 (4th Cir. 2004) 14
Anin v. *Reno*, 188 F.3d 1273 (11th Cir. 1999) 9
Borges v. *Gonzales*, 402 F.3d 398 (3d Cir. 2005) 15, 17
Coleman v. *Thompson*, 501 U.S. 722 (1991) 13, 18
Hernandez-Moran v. *Gonzales*, 402 F.3d 496 (8th Cir. 2005) 14
Iavorski v. *INS*, 232 F.3d 124 (2d Cir. 2000) 18, 19
INS v. *Abudu*, 485 U.S. 94 (1988) 13
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 10
INS v. *Doherty*, 502 U.S. 314 (1992) 12
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 20
Jobe v. *INS*, 238 F.3d 96 (1st Cir. 2001) 14
Lawrence v. *Florida*, 127 S. Ct. 1079 (2007) 8
Lei, In re, 22 I. & N. Dec. 113 (B.I.A. 1998) 11, 12

Cases—Continued: Page

Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 14
Lopez v. *INS*, 184 F.3d 1097 (9th Cir. 1999) 15
Lozada, In re, 19 I. & N. Dec. 637 (B.I.A.), review denied, 857 F.2d 10 (1st Cir. 1988) 6, 7, 20
Magala v. *Gonzales*, 434 F.3d 523 (7th Cir. 2005) 13
Pervaiz v. *Gonzales*, 405 F.3d 488 (7th Cir. 2005) 19
Pioneer Inv. Servs. Co. v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) 14
Riley v. *INS*, 310 F.3d 1253 (10th Cir. 2002) 19
Rodriguez-Lariz v. *INS*, 282 F.3d 1218 (9th Cir. 2002) .. 16
Scorteanu v. *INS*, 339 F.3d 407 (6th Cir. 2003) 14
United States v. *Boyle*, 469 U.S. 241 (1985) 14
United States v. *Brockamp*, 519 U.S. 347 (1997) 10, 12
Varela v. *INS*, 204 F.3d 1237 (9th Cir. 2000) 16
Wainwright v. *Torna*, 455 U.S. 586 (1982) 13
Yakus v. *United States*, 321 U.S. 414 (1944) 21
Zhao v. *INS*, 452 F.3d 154 (2d Cir. 2006) 19

Statutes:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 11
§ 304(a)(3), 110 Stat. 3009-589 11
§ 308(b)(6), 110 Stat. 3009-615 (8 U.S.C. 1229a) ... 11
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1227(a)(1)(B) 3
8 U.S.C. 1229(a) 5, 11

Statutes and regulations—Continued Page

8 U.S.C. 1229(a)(1) 2, 4, 12
8 U.S.C. 1229(a)(2) 12
8 U.S.C. 1229(a)(1)(A) 2
8 U.S.C. 1229(a)(1)(C) 2
8 U.S.C. 1229(a)(1)(D) 2
8 U.S.C. 1229(a)(1)(F)(i)-(iii) 2
8 U.S.C. 1229a (2000 & Supp. V 2005) 2
8 U.S.C. 1229a(b)(4)(A) 13
8 U.S.C. 1229a(b)(5) 2
8 U.S.C. 1229a(b)(5)(A) 2
8 U.S.C. 1229a(b)(5)(C) 2, 3, 6, 11, 12
8 U.S.C. 1229a(b)(5)(C)(i) 5, 7, 9, 12, 14, 15
8 U.S.C. 1229a(b)(5)(C)(ii) 5, 8, 9, 12
8 U.S.C. 1229a(c)(6)(C) (Supp. V 2005) 8, 22
8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005) 22
8 U.S.C. 1229a(e)(1) (Supp. V 2005) 3
8 U.S.C. 1252b(c)(3) (1994) 11
8 U.S.C. 1252b(c)(3)(A) (1994) 11
6 U.S.C. 251 (Supp. V 2005) 2
8 C.F.R.:
Section 3.2(c)(2) (2000) 16
Section 1003.2(c)(2) 19

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter*, but is reprinted in 227 Fed. Appx. 786. The decisions of the Board of Immigration Appeals (Pet. App. 8a-9a) and the immigration judge (Pet. App. 10a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2007. The petition for a writ of certiorari was filed on June 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that removal proceedings

brought under 8 U.S.C. 1229a (2000 & Supp. V 2005) are initiated by a written Notice to Appear served in person on the alien, or, if personal service is not practical, "through service by mail to the alien or to the alien's counsel of record." 8 U.S.C. 1229(a)(1). The Notice to Appear must identify, among other things, the nature of the proceedings, the conduct alleged to be unlawful, and the charges against the alien. 8 U.S.C. 1229(a)(1)(A), (C), and (D). The Notice must also inform the alien of her obligations to provide the Attorney General with an address at which she may be contacted and to "immediately" notify the Attorney General of any changes, and state that not doing so could result in failure to receive further notices and an order of removal being entered *in absentia*. 8 U.S.C. 1229(a)(1)(F)(i)-(iii), 1229a(b)(5).

b. Section 1229a sets forth procedures for the conduct of removal proceedings. In situations where an alien fails to appear, Section 1229a(b)(5)(A) provides that the alien "shall be ordered removed in absentia if the [Immigration and Naturalization] Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A).[1] "The written notice * * * shall be considered sufficient," this provision continues, "if provided to the most recent address provided under section 1229(a)(1)(F) of this title." *Ibid.*

Section 1229a(b)(5)(C) sets forth limited circumstances in which a removal order that was entered *in absentia* may be rescinded. "Such an order," it declares, "may be rescinded only—

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[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section),[2] or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

8 U.S.C. 1229a(b)(5)(C).

2. Petitioner is a native and citizen of Brazil who overstayed a nonimmigrant visitor visa. Administrative Record (A.R.) 121. On October 3, 2002, petitioner filed an application to change her status based on her marriage to an American citizen. A.R. 183-186. On the application, petitioner gave her address as: "7101 Springer Road; Wilmington, NC 28410." A.R. 183. That application was later withdrawn after petitioner's husband announced that he did not wish to proceed, and the marriage was later annulled. A.R. 165.

3.a. On December 16, 2003, the Department of Homeland Security (DHS) issued a Notice to Appear alleging that petitioner was removable under 8 U.S.C. 1227(a)(1)(B), and was subject to removal as a result.

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[2] The statute defines "exceptional circumstances" as "refer[ring] to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1229a(e)(1) (Supp. V 2005).

A.R. 122, 189; see note 1, *supra*. The Notice to Appear was sent via regular mail to the last address petitioner had provided to DHS: the Springer Road residence listed on petitioner's October 2002 application for adjustment of status. A.R. 183, 189.

Unbeknownst to DHS, petitioner had changed her mailing address. At some point between her October 2002 application and the December 16, 2003 Notice to Appear, petitioner obtained a post office box in Wilmington, North Carolina and directed the Postal Service to forward mail from the Springer Road residence to that box. A.R. 165. Although petitioner acknowledges that she did not inform DHS of her new address, she has conceded that she personally received a copy of the Notice to Appear in "December 2003." Pet. 4; see A.R. 165.

The Notice to Appear contained all of the information required by 8 U.S.C. 1229(a)(1). It informed petitioner that her hearing would be held at a time set by the Office of the Immigration Judge, and that notice of the hearing "will be mailed to the address provided by [petitioner]." A.R. 189; see A.R. 190 ("Notices of hearing will be mailed to this address."). The Notice to Appear also stated that petitioner was required to "notify the Immigration Court immediately * * * whenever you change your address." *Ibid.* Finally, the Notice stated that if petitioner failed to attend the hearing at the "date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence." *Ibid.* Despite these instructions, petitioner never notified DHS or the Immigration Court that she had changed her address. Pet. 5.

On February 12, 2004, the Immigration Court mailed a Notice of Hearing in Removal Proceedings to peti-

tioner at the Springer Road address. A.R. 187-188. The hearing was scheduled for March 16, 2004. *Ibid.* Petitioner did not appear at the hearing, and, on March 16, 2004, an immigration judge (IJ) entered an *in absentia* order directing that petitioner be removed to Brazil. A.R. 182.

b. On July 12, 2005—483 days after entry of the order of removal—petitioner filed a motion with the Immigration Court to reopen her removal proceedings. A.R. 165-168. In that initial motion, petitioner asserted that she had not learned about her March 16, 2004 removal hearing or the IJ's *in absentia* removal order until her attorney inquired as to whether a removal hearing had been scheduled. A.R. 166-167. Although the motion stated that petitioner had submitted a second application for adjustment of status to United States Customs and Immigration Service (USCIS) in DHS in April 2004 that contained her new address, A.R. 166, it did not acknowledge petitioner's failure to update her address with the Immigration Court in the Department of Justice either before or after she received the December 16, 2003 Notice to Appear or at any time before the removal hearing. Nor did the motion address petitioner's failure to seek reopening within the 180-day period specified in 8 U.S.C. 1229a(b)(5)(C)(i), or assert that petitioner had failed to "receive notice in accordance with paragraph (1) or (2) of [8 U.S.C] 1229(a)," see 8 U.S.C. 1229a(b)(5)(C)(ii).

On July 22, 2005, the IJ denied petitioner's motion. A.R. 124-126. Petitioner's receipt of the Notice to Appear, the IJ reasoned, had given petitioner notice that she was subject to removal proceedings and had clearly informed petitioner of both her obligation to ensure that the Immigration Court had her current address and the

possible consequences of failing to do so. A.R. 125. The IJ also determined that petitioner satisfied none of the bases set forth in 8 U.S.C. 1229a(b)(5)(C) for rescinding an *in absentia* removal order. A.R. 125-126. Petitioner did not appeal the IJ's decision to the BIA.

c. On August 31, 2005, petitioner, now represented by new counsel, filed a second motion to reopen her removal proceedings. A.R. 144-149. In the second motion, petitioner claimed that her failure to attend her removal hearing was the result of "exceptional circumstances," which she identified as the "ineffective assistance" of her former attorney in failing to file the proper change of address forms, instruct petitioner to do so, or contact the Immigration Court for a status update regarding petitioner's removal hearing. A.R. 144-147.

Although the BIA's decision in *In re Lozada*, 19 I. & N. Dec. 637, 639, review denied, 857 F.2d 10 (1st Cir. 1988), ordinarily requires, as a condition for relying on asserted ineffective assistance of counsel, "that disciplinary authorities be notified of breaches of professional conduct," petitioner conceded that she had not done so, see A.R. 147. Instead, the motion appended an affidavit of the former counsel, Kenneth Hatcher. A.R. 152-154. The affidavit described the services counsel performed for petitioner in connection with submitting an application for adjustment of status with USCIS in DHS, A.R. 152-153, but did not state that Hatcher had been retained by petitioner to represent her in the separate removal proceedings before an IJ in the Department of Justice. Also, although counsel stated that he "did not recognize" that there was a problem with petitioner's receiving mail or that mail was being forwarded by a Postal Service forwarding order, and that he "failed to advise" petitioner to notify the government of a

change of address, A.R. 152, he did not identify any circumstances that should have led him to recognize any problem with petitioner's receipt of mail or to reiterate the notice petitioner receive in the Notice to Appear that she should inform the Immigration Court of any change of address. Finally, petitioner did not acknowledge in her motion that 8 U.S.C. 1229a(b)(5)(C)(i) declares that "exceptional circumstances" rescissions are available *only* where the "motion to reopen [is] filed within 180 days after the date of the order of removal," and she did not assert that the 180-day period is subject to equitable tolling.

On September 22, 2005, the IJ denied petitioner's second motion to reopen on the grounds that petitioner had already filed one such motion, and that petitioner had failed to comply with the requirements of *Lozada*, *supra*. A.R. 119. The IJ also reiterated that the Notice to Appear had given petitioner notice of the need to update her address with the Immigration Court. *Ibid.* Petitioner again did not appeal the IJ's denial of her motion to the BIA.

d. On October 24, 2005, petitioner filed with the IJ a motion to reconsider the denial of her second motion to reopen. A.R. 71-76. In that motion, petitioner attached a bar complaint filed against her previous attorney. A.R. 72, 79. In her motion to reconsider, petitioner acknowledged that the Notice to Appear had informed her of her obligation to keep her address up to date, but stated that she had relied upon the advice of her "experienced immigration law attorney" that she should "wait for a hearing notice." A.R. 72-73. In support of her motion to reconsider, petitioner and her new husband stated that they had retained Hatcher to represent them in seeking adjustment of status before USCIS; they did

not, however, state that the retainer extended to representing petitioner before the Immigration Court, see A.R. 82-83, 85, and Hatcher did not enter a notice of appearance on petitioner's behalf with the Immigration Court, A.R. 73. Once again, petitioner neither acknowledged the 180-day deadline, nor argued that the period could be tolled.

On October 26, 2005, the IJ denied petitioner's motion for reconsideration. Pet. App. 10a-14a. The IJ first identified a procedural defect with petitioner's motion: Although "[a] motion to reconsider shall * * * specify[] the errors of fact or law in the Immigration Judge's prior decision," petitioner's motion had not "cite[d] any errors of fact or law in the prior two decisions." *Id.* at 11a-12a; see 8 U.S.C. 1229a(c)(6)(C) (Supp. V 2005). In addition, although petitioner had not raised the issue, the IJ also concluded "that equitable tolling is not applicable," because petitioner had "acknowledged service of" a document that clearly advised her of her duty to keep her address up to date and because the affidavit filed by petitioner's former attorney "does not state that he informed [petitioner] not to advise the Government or the Court of any change of address." Pet. App. 12a-13a.

e. Petitioner appealed this ruling to the BIA. A.R. 7-20, 29-46. On that appeal, petitioner acknowledged for the first time that both of her motions to reopen had failed to comply with the 180-day time limit. A.R. 23. And, as pertinent here, petitioner also asserted, in one sentence, that the IJ "erred in holding that equitable tolling did not apply in this case." A.R. 58.[3]

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[3] Petitioner's other argument before the BIA was that her attorney's alleged ineffectiveness had caused her to lack "actual notice" of the removal hearing, which, she suggested, caused her to "fit within the [8 U.S.C. 1229a](b)(5)(C)(ii) exception for 'lack of notice.'" A.R. 24.

The BIA dismissed petitioner's appeal. Pet. App. 8a-9a. The BIA stated that the notice of hearing "was reasonably calculated to reach [petitioner]," because it had been sent "to the same post office box where the Notice to Appear was successfully received by [petitioner] the month before the hearing notice was mailed," and because petitioner had "concede[d] in her brief that she was continuing to use the same * * * post office address for her mail at the time when the hearing notice was sent." *Ibid.*[4] In addition, the BIA declined to consider petitioner's "exceptional circumstances claim because not one of her three motions was filed within the 180-day statutory period." *Id.* at 9a (citing *Anin* v. *Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999)).

4. A unanimous panel of the Court of Appeals for the Eleventh Circuit denied a petition for review in an unpublished per curiam opinion. Pet. App. 1a-5a. Citing its earlier decisions in *Anin, supra*, and *Abdi* v. *United States Attorney General*, 430 F.3d 1148 (11th Cir. 2005), see Pet. App. 3a-4a, the court of appeals concluded that the 180-day period set forth in 8 U.S.C. 1229a(b)(5)(C)(i)

Petitioner does not renew that claim before this Court, and it is without merit in any event. See 8 U.S.C. 1229a(b)(5)(C)(ii) (stating that motion to reopen proceedings may be "filed at any time if the alien demonstrates that the alien did not receive notice *in accordance with paragraph (1) or (2) of section 1229(a)*" (emphasis added)).

[4] As noted earlier (pp. 4-5, *supra*), both the Notice to Appear and Notice of Hearing were actually mailed to the Springer Road address that petitioner had provided to DHS in 2002. It is undisputed, however, that petitioner actually received the Notice to Appear after it was forwarded to the post office box she was using. Pet. 4. In her original motion to reopen her removal proceedings, moreover, petitioner stated that she maintained the post office box "until May 2004," A.R. 165, which was several months after the Notice of Hearing was mailed, A.R. 187-188.

cannot be tolled "based upon alleged ineffectiveness of counsel," Pet. App. 4a. Accordingly, the court of appeals held that "the BIA did not abuse its discretion in declining to consider [petitioner's] exceptional circumstances claim because she did not file a motion to reopen within the 180-day filing period." *Id.* at 5a.

ARGUMENT

Petitioner contends (Pet. 7-17) that the Eleventh Circuit's refusal to require the BIA to apply equitable tolling in the circumstances of this case was both erroneous and conflicts with the decisions of other courts of appeals. Further review is not warranted, because the Eleventh Circuit's unpublished decision is correct, no other court of appeals would hold that the BIA abused its discretion in refusing to apply equitable tolling on these facts, and petitioner would be unable to obtain relief even if equitable tolling were sometimes available.

1. The BIA did not abuse its discretion in affirming the IJ's denial of petitioner's motion to reconsider its earlier denial of petitioner's second untimely motion to reopen her removal proceedings. Whether a given statutory time limitation is subject to equitable tolling is ultimately a matter of statutory construction. See, *e.g.*, *United States* v. *Brockamp*, 519 U.S. 347, 349-354 (1997). In addition, this Court's decisions confirm that the BIA's reasonable constructions of the immigration statutes that it administers are entitled to *Chevron* deference, including in situations where those interpretations are announced in the course of adjudicating individual cases. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

In two decisions issued in 1998, the BIA concluded that the 180-day deadline for motions to reopen proceed-

ings based on "exceptional circumstances" contained in former 8 U.S.C 1252b(c)(3)(A) (1994)—a provision whose language was in all material respects identical to the one at issue in this case[5]—contained no "exception" for situations "where the failure to timely file a motion to reopen is due to ineffective assistance of counsel." *In re Lei*, 22 I. & N. Dec. 113 , 116 (B.I.A. 1998); see *In re A-A-*, 22 I. & N. Dec. 140, 143 (B.I.A. 1998). The statutory language, the Board stressed, clearly stated that deportation orders could be rescinded "*only*" in the specifically enumerated circumstances, and contained "no exceptions to [the 180-day] time bar." *Lei*, 22 I. & N. Dec. at 116; *A-A-*, 22 I. & N. Dec. at 143. The BIA also explained that its interpretation was "consistent with the overall statutory scheme," because the broader provision of which the relevant language was a part had been "enacted to provide stricter and more comprehensive deportation procedures, particularly for in absentia hearings, to ensure that proceedings are brought to a

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[5] Former Section 1252b(c)(3) provided that an order of deportation entered in *absentia* could be rescinded "only—

(A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

(B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

8 U.S.C. 1252b(c)(3) (1994). This provision was repealed by Section 308(b)(6) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-615, and redesignated as 8 U.S.C. 1229a by IIRIRA Section 304(a)(3), Div. C, 110 Stat. 3009-589. See pp. 2-3, *supra* (quoting current Section 1229a(b)(5)(C)).

conclusion with meaningful consequences." *Lei*, 22 I. & N. Dec. at 116; *A-A-*, 22 I. & N. Dec. at 144.

The BIA's conclusion that allegations of ineffective assistance of counsel are insufficient to prevent the running of the 180-day time period for filing motions to reopen based on exceptional circumstances is entirely reasonable and thus entitled to deference by the courts. Section 1229a(b)(5)(C) states that an *in absentia* removal order may be rescinded "only" in three specified circumstances—where the alien's failure to attend the removal hearing was due to "exceptional circumstances," where the alien "did not receive notice in accordance with [8 U.S.C. 1229(a)(1) or (2)]", or where imprisonment prevented the alien from attending the hearing. 8 U.S.C. 1229a(b)(5)(C)(i) and (ii). Of the enumerated grounds, only one—the provision under which petitioner seeks relief—contains a time limitation. That "explicit listing" of provisions as to which time limits do and do not apply demonstrates "that Congress did not intend [the agency or] courts to read other unmentioned, open-ended 'equitable' exceptions into the statute that it wrote." *Brockcamp*, 519 U.S. at 352.

In addition, "the nature of the underlying subject matter" (*Brockcamp*, 519 U.S. at 352) reinforces the conclusion that Congress did not intend to permit equitable tolling based on claims of ineffective assistance of counsel. As this Court has explained, motions to reopen removal proceedings are "especially" disfavored because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). In addition, permitting aliens to avoid the 180-day time bar by claiming ineffective assistance of counsel would "waste the time and efforts of immigration judges called

upon to preside at [the] hearings" that would presumably be necessary whenever an alien could make a "prima facie" ineffectiveness claim. *INS* v. *Abudu*, 485 U.S. 94, 108 (1988) (internal quotation marks and citations omitted).

2. Petitioner nonetheless asserts (Pet. 7) that this Court should grant review because of what she asserts is a "true split" involving whether equitable tolling is available in situations where an alien claims that her failure to comply with the 180-day time limitation was due to the"ineffectiveness" of the alien's privately retained attorney.[6] Petitioner is mistaken; in fact, it is

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[6] Although it is not the ground upon which she seeks a writ of certiorari, petitioner errs in suggesting (Pet. 8) that "[a]liens enjoy the right to effective assistance of counsel in removal proceedings." An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does *not* require the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution. *Id.* at 754; see *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of criminal conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant * * * is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations

entirely likely that no court of appeals would have held that the BIA abused its discretion in declining to apply equitable tolling on the facts presented here.

a. Two of the published decisions that petitioner cites merely assumed without deciding that equitable tolling is sometimes available under 8 U.S.C. 1229a(b)(5)(C)(i) before denying relief on other grounds. The First Circuit did not "recogniz[e] equitable tolling" (Pet. 10), in *Jobe* v. *INS*, 238 F.3d 96 (2001) (en banc). Rather, the court "dimiss[ed the alien's] petition without deciding whether the equitable tolling doctrine may apply to this statutory provision." *Id.* at 100. The same is true of *Scorteanu* v. *INS*, 339 F.3d 407 (6th Cir. 2003) (Pet. 10), where the court stated that it "need not decide * * * whether the statute is subject to equitable tolling because, even if this court were to so concede, Scorteanu has failed to prove entitlement to equitable relief." *Id.* at 413; see *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005) (similar).[7]

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omitted). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). Thus, although petitioner is correct that a number of courts have held that an alien has a constitutionally based claim of ineffective assistance of counsel in removal proceedings, this Court's decisions do not support that proposition.

[7] Petitioner also refers (Pet. 10) to the Fourth Circuit's unpublished decision in *Akwada* v. *Ashcroft*, 113 Fed. Appx. 532 (2004). In that case, the court of appeals assumed—again without deciding—that equitable tolling is sometimes available under certain regulations governing removal proceedings. See *id.* at 539 n.7 ("Because we do not find equitable tolling in this case, we need not reach the issue whether the statutory and regulatory time and number bars on motions to

b. Although the Third and Ninth Circuits have concluded that equitable tolling is sometimes available under Section 1229a(b)(5)(C)(i), both courts have carefully limited their holdings to situations in which the alien's failure to file a timely and otherwise proper motion was the result of fraud. In *Borges* v. *Gonzales*, 402 F.3d 398 (3d Cir. 2005) (Pet. 10), an alien alleged that his failure to attend his removal hearing had been due to ineffective assistance of counsel, and that his failure to file a timely motion to reopen his removal proceedings on that basis had been due to a paralegal's false statement that such a document had, in fact, been filed. See 402 F.3d at 402. Taking care to note that the alien's argument was *not* "that ineffective assistance of counsel can or should constitute an 'exception' to the 180-day time limit," *id.* at 405, the Third Circuit held that the period may be equitably tolled where an alien has been the victim of "fraud," which it defined as a situation in which the alien actually and reasonably relied on "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party." *Id.* at 407 (brackets in original; internal quotation marks and citation omitted).

The Ninth Circuit's decisions are similar. In *Lopez* v. *INS*, 184 F.3d 1097 (1999), that court held that the 180-day limitations period contained in the predecessor statute that the BIA construed in *Lei* and *A-A-* (see pp. 11-12 & note 5, *supra*), was subject to equitable tolling "where the alien's late petition [to reopen was] the result of the deceptive actions by a notary posing as an attorney." *Lopez*, 184 F.3d at 1100; see *id.* at 1098 ("We

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reopen removal proceedings are jurisdictional such that equitabl[e] tolling may never be employed to overcome them.").

conclude that the statutory time limit for reopening is tolled by the *fraudulent* representations made by Lopez's former 'counsel.'" (emphasis added)). In *Varela* v. *INS*, 204 F.3d 1237 (2000) (Pet. 14-15), the Ninth Circuit extended *Lopez*'s reasoning to "[a] federal regulation [that] places time and numerical limits on motions to reopen deportation proceedings" in situations where an alien attended the initial removal hearing. *Id.* at 1239 (citing 8 C.F.R. 3.2(c)(2) (2000)). Once again, however, the Ninth Circuit stressed that equitable tolling was available because the alien had been "*defrauded* by an individual purporting to provide legal representation." *Id.* at 1240 (emphasis added). *Rodriguez-Lariz* v. *INS*, 282 F.3d 1218 (9th Cir. 2002) (Pet. 10), construed the same regulation that had been at issue in *Varela*. 282 F.3d at 1223-1224. There, the Ninth Circuit concluded that equitable tolling was available because a non-lawyer to whom the aliens had given money to coordinate their removal proceedings had "missed the deadline for filing the application for suspension of deportation[,] * * * *lied* [to the aliens] about having done so," and later "compounded his mistakes and misrepresentations by advising the filing of a motion for reconsideration that prejudiced [the alien's] claims. *Id.* at 1224-1225 (emphasis added). In such circumstances, the court of appeals concluded, the advisor's actions "constitute the type of fraudulent representation that triggers equitable tolling under *Varela* and *Lopez*." *Id.* at 1225.

Here, petitioner neither alleges fraud, nor asserts facts that could establish the kind of fraudulent conduct deemed sufficient to warrant equitable tolling in *Borges*, *Lopez*, *Varela*, and *Rodriguez-Lariz*. Petitioner's questions presented describe the issue before this Court as

whether the 180-day period may be tolled based "ineffective assistance of counsel." See Pet. 3 (same); Pet. 17 (characterizing counsel's actions as "deficient"). Nor does the petition for a writ of certiorari allege anything that could fairly be characterized as "fraud" by petitioner's former attorney. Far from advising petitioner not to attend her removal hearing or misleading her into believing that a timely motion to reopen had been filed, see *Borges*, 402 F.3d at 401-402, petitioner asserts that the attorney failed expressly to reiterate an obligation—that is, to keep her mailing address up to date—of which petitioner was already on notice, and did not on his own initiative "call the Immigration Court information line to find out if [petitioner] already had a hearing scheduled." Pet 5.[8] Even taking these allegations at face value, silence and inaction fall far short of the sort of affirmative "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party" (*Borges*, 402 F.3d at 407) that would be necessary to support a finding of fraud. Accordingly, neither Third nor Ninth Circuit precedent would support the conclusion that the BIA abused its discretion in failing to apply equitable tolling in this case.

c. Petitioner is correct that the Second, Seventh, and Tenth Circuits have stated that ineffective assis-

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[8] In her brief to the BIA, petitioner claimed that she failed to advise the Immigration Court of her change of address "[i]n reliance on [her former attorney's] advice." A.R. 24. As the IJ noted (A.R. 69), however, there does not appear to be any evidence in the record that petitioner's attorney affirmatively advised her *not* to notify the Immigration Court that her address had changed. See A.R. 152 (affidavit by petitioner's former attorney: "I failed to advise [petitioner] to notify USCIS of a change of address").

tance of counsel may, at least in certain circumstances, justify equitable tolling of various statutory or regulatory limitations on motions to reopen removal proceedings. Two of the decisions she cites, however, do not even involve the statutory 180-day deadline for moving to reopen *in absentia* removal orders. All three of the decisions, moreover, predate this Court's recent clarification, in the habeas corpus context, that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in [a] context where [litigants] have no constitutional right to counsel." *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007). As explained above (see note 6, *supra*), an alien has no constitutional right to have counsel furnished by the government in removal proceedings, and therefore, under *Coleman* v. *Thompson*, 501 U.S. 722 (1991), has no constitutionally based claim of ineffective assistance of counsel. Accordingly, to the extent that any of these decisions suggests that another court of appeals may have granted relief on the facts presented here, such a holding cannot survive *Lawrence*.

At any rate, it is highly unlikely that petitioner would have been able to obtain relief in any other circuit even before *Lawrence*. The relevant holding of *Iavorski* v. *INS*, 232 F.3d 124 (2d Cir. 2000) (Pet. 10), was that ineffective assistance of immigration counsel could sometimes warrant tolling a 90-day limitations period set forth in a 1996 Department of Justice regulation that is not at issue in this case. See 232 F.3d at 129-130.[9] In so holding, the Second Circuit relied on the text of the statute directing the Department of Justice to

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[9] The regulation was the same one at issue in the Ninth Circuit's decision in *Varela*, *supra*. See *Iavorski*, 232 F.3d at 131.

place limitations on the number of and time for filing motions to reopen and reconsider, "the Department of Justice's own interpretation of its rulemaking mandate from Congress, and the BIA's view of the rules that were promulgated." *Id.* at 130. In addition, moreover, the *Iavorski* court held that equitable tolling was unavailable as a matter of law in that case because the alien had failed to exercise "due diligence" during the period that he sought to have tolled. *Id.* at 134.[10] The Seventh and Tenth Circuits have likewise held that equitable tolling is unavailable absent a showing of due diligence by the alien. See *Pervaiz* v. *Gonzales*, 405 F.3d 488, 491 (7th Cir. 2005) (Pet. 10); *Riley* v. *INS*, 310 F.3d 1253, 1254-1255, 1258 (10th Cir. 2002) (involving alien who had attended initial removal hearing) (Pet. 10).

As the IJ found in this case (Pet. App. 12a-14a), petitioner would not be eligible for equitable tolling even were allegations of ineffective assistance of counsel sometimes sufficient to authorize it. Petitioner acknowledges that she received the December 16, 2003 Notice to Appear, and that she did so *only* because the Notice had been forwarded to her new post office box. Pet. 4; see A.R. 122, 189. Yet despite the fact that that notice clearly informed petitioner that a hearing would be scheduled for a later date and stressed that petitioner had an obligation to keep the Immigration Court

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[10] In *Zhao* v. *INS*, 452 F.3d 154 (2006) (per curiam), the Second Circuit found that the BIA had "erred" in refusing to find equitable tolling of both the time and number limits sets forth in 8 C.F.R. 1003.2(c)(2) based on the combination of "the ineffective assistance of the attorney who filed [the alien's] first motion to reopen" and the alien's "impressive diligence in retaining new counsel and promptly filing a new motion." *Zhao*, 452 F.2d at 160.

apprised of her most current address, A.R. 189-190, petitioner neither updated her address nor made any effort to contact the Immigration Court about her removal proceeding for nearly eighteen months, see Pet. 4. When petitioner finally did seek to reopen her removal proceedings, she made no effort to explain her failure to comply with the 180-day deadline for seeking to reopen an *in absentia* removal order, let alone to justify equitable tolling of that deadline, in *any* of the three motions that she filed with the IJ. In fact, it was not until her appeal to the BIA of the IJ's denial of her motion to reconsider the denial of her second untimely motion that petitioner even acknowledged her failure to comply with the statutory deadline. See pp. 5-8, *supra*. Under these circumstances, no court could be expected to find that petitioner exercised sufficient "due diligence in preserving [her] legal rights" to justify resort to the "sparingly" invoked doctrine of equitable tolling. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

What is more, it is highly doubtful that petitioner could establish ineffective assistance by her former attorney in any event. In *Lozada*, *supra*, the Board stated that an alien claiming ineffective assistance of counsel in removal proceedings must "include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken." 19 I. & N. Dec. at 639. Although petitioner, her husband, and Hatcher, her former counsel, all recounted in their affidavits that Hatcher was retained to represent petitioner and her husband in filing an application for adjustment of status with the USCIS in DHS, none of them stated that Hatcher had also been retained to represent petitioner in her separate removal proceed-

ings before the IJ in the Department of Justice. See pp. 6-8, *supra*. And before this Court, petitioner states only that she paid Hatcher "$1065 in anticipation of getting married and filing an adjustment of status for [petitioner]." Pet. 4. On this record, petitioner has not established that Hatcher's representation even encompassed petitioner's removal proceedings during the relevant time period and has therefore not established an essential predicate for a claim of ineffective assistance of counsel in those proceedings.[11]

Moreover, if it is assumed even *arguendo* that Hatcher's representation encompassed the removal proceeding, petitioner has not demonstrated ineffective assistance of counsel. Hatcher stated in his affidavit that petitioner filed with the IJ in support of her second motion to reopen that he "did not recognize" that there was a problem with petitioner's receiving her mail or that the mail was being forwarded pursuant to a Postal Service forwarding order, and that he "failed to advise" petitioner to notify the government of a change of address. A.R. 152. But Hatcher did not identify any circumstance that should have led him to "recognize" any problem with petitioner's receipt of mail from the Immigration Court; to the contrary, petitioner came to Hatcher in January 2004 to discuss the Notice to Appeal

[11] Petitioner also summarily asserts (Pet. 16-17) that the court of appeals' decision in this case "amounts to a clear violation of [petitioner's] due process rights" on the theory that she "had a clear avenue for relief from removal in that she was married to a U.S. citizen." Petitioner provides no legal authority for this assertion, nor does she assert a conflict with any other lower court. In any event, it is well-established that even a constitutional right "may be forfeited * * * by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).

she *had* received, *ibid.* Nor did Hatcher identify any reason why he should have reiterated orally the warning explicitly set forth in the Notice to Appear that petitioner should advise the Immigration Court of any change of address. The need for petitioner to do so would have been obvious to her in any event, since petitioner represented in *her* affidavit submitted to the IJ that she had rented her post office box "specifically to receive all correspondence from the Department of Homeland Security and the Immigration Court." A.R. 82.

3. Finally, to the extent that there is any tension in the approaches currently followed by the various courts of appeals, there are two additional reasons why this case would be an unsuitable vehicle to address it. As explained earlier (pp. 5-8, *supra*), the filing at issue here is petitioner's motion to reconsider the IJ's denial of her second—and untimely—motion to reopen her removal proceedings. The relevant statute, however, clearly states that an alien may file *one* motion to reopen proceedings under this section. 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005). In addition, as the IJ noted, although a motion to reconsider must "specify the errors of law or fact in the previous order," 8 U.S.C. 1229a(c)(6)(C) (Supp. V 2005), petitioner's motion for reconsideration "d[id] not cite any errors of fact or law in the [IJ's] prior two decisions." Pet. App. 12a. Although neither of these bases was relied upon by the BIA or the court of appeals, they provide additional reasons why the result in petitioner's case would be exceedingly unlikely to change even were this Court to hold that the 180-day deadline may be equitably tolled in certain circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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